

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

**POLICE DEPARTMENT OF THE
CITY OF OMAHA**

and

**OMAHA POLICE UNION, LOCAL UNION 101
AFL-CIO - I.U.P.A.**

**FMCS Case No. 12-00388-A
Grievant: A. Pennington
Arbitrator: Sharon K. Imes**

APPEARANCES:

Bernard J. in den Bosch, Assistant City Attorney, appearing on behalf of the Police Department of the City of Omaha, Nebraska.

Cline Williams Wright Johnson & Oldfather, L.L.P. by Stanton N. Beeder, Attorney, appearing on behalf of the Omaha Police Union, Local Union 101, AFL-CIO - I.U.P.A. and the Grievant.

JURISDICTION:

The Police Department of the City of Omaha, Nebraska, referred to herein as the Employer, and Local Union 101, referred to herein as the Union, are parties to a collective bargaining agreement effective December 14, 2008 until December 21, 2013 and thereafter for successive one (1) calendar year periods unless one of the parties provides notice of the desire to modify the agreement as provided for in Article 47 of the agreement. Under this agreement, the undersigned was selected from a Federal Mediation and Conciliation Service panel to decide two disputes that have occurred between them. One of the disputes has since been decided and the remaining dispute is the remaining dispute involving A. Pennington, the Grievant.

STATEMENT OF THE ISSUE:

Is there just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**ARTICLE 2
MANAGEMENT RIGHTS**

Except where limited by express provisions elsewhere in this Agreement, nothing in this Agreement shall be construed to restrict, limit, or impair the rights, powers, and the authority of the CITY as granted to it under the laws of the State of Nebraska, the Home Rule Charter of the City of Omaha, 1956, and CITY's ordinances. These rights, powers, and authority include, but are not limited to the following:

5. The right to hire, examine, classify, promote, train, transfer, assign, and retain employees; suspend, demote, discharge, or take other disciplinary action against employees for just cause; to relieve employees from duties due to lack of work or funds.

**ARTICLE 6
DISCHARGE AND DISCIPLINE**

SECTION 1 **DISCIPLINARY ACTION - CAUSE:** Any action which reflects discredit upon the service or is a direct hindrance to the effective performance of the CITY government functions shall be considered good cause for disciplinary action. The following are declared to be good cause for disciplinary action against any employee; though charges may be based upon causes and complaints other than those listed:

- (j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his admonishment, reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient conduct of business of the CITY or for the best interest of the CITY government.

Violation of the provisions of this Section may be punishable by reprimand, suspension, demotion, and/or discharge.

SECTION 5 **DISCIPLINARY ACTIONS - DISCHARGE:** An employee may be discharged for cause. Prior to the discharge becoming effective a written statement containing the reasons for the discharge shall be transmitted to the employee and to the Human Resources Department for inclusion in the employee's personnel file. The CITY may suspend such employee immediately and indefinitely with pay. Prior to the discharge becoming effective such employee shall be entitled to present his side of the facts surrounding the discharge to an impartial CITY decision maker.

SECTION 6 Any disciplinary action must be imposed and received by the officer within 100 calendar days from the date the alleged violation occurred. This time limitation shall not apply if the disciplinary action results from or is the product of a criminal investigation. The police department shall not engage in a criminal investigation for the purpose of bypassing the 100

calendar day time limitation. An extension of the time period may be granted if mutually agreed upon by the Labor Relations Director and the Union.

...
**ARTICLE 7
APPEAL PROCEDURE**

SECTION 1 Any employee who has satisfactorily completed twelve (12) months of employment with the CITY shall have the right to appeal to either the Personnel Board or arbitration, but not both, from a suspension, termination of employment, or reduction in classification of pay not later than ten (10) working days after receiving notice of such action. . . . There shall be no right of appeal from the Personnel Board to the arbitrator or from the arbitrator to the Personnel Board.

...
SECTION 5 If an election is made to appeal to arbitration, the procedure for selection of the arbitrator shall be as set forth in Article 8, Step 3, second paragraph, of this Agreement.

...
**ARTICLE 8
GRIEVANCE PROCEDURE**

SECTION 1 "Grievance" as defined in this agreement is a claim of an employee arising during the term of this Agreement which is limited to matters of interpretation or application of the express provisions of this Agreement and excluding discharge and disciplinary actions as provided in Article 6 hereof, which actions shall be processed in accordance with Appeal Procedure as set forth in Article 7 of this Agreement. The UNION shall have the right to file a grievance in accordance with Article 8.

...
SECTION 2 The following procedure shall be used in the submission of a grievance, as defined in Section 1 hereof.

...
Step 3:

The arbitration proceeding shall be conducted by an arbitrator to be mutually selected by the parties . . . If the parties are unable to mutually agree as to the selection of an arbitrator within such time limit and either party continues to demand arbitration, the parties shall jointly request the Federal Mediation and Conciliation Service (FMCS) to provide a list of five (5) arbitrators. Each party shall have the right to strike two (2) names from the list of arbitrators submitted. . . .

There shall be no appeal from the arbitrator's decision. It shall be final and binding on the UNION, if the UNION is a party to the arbitration, the CITY, and on all bargaining unit employees who take part in or are represented in the arbitration proceeding. Where an employee elects to process a grievance without UNION representation or assistance, the UNION shall have the right after the arbitrator has been selected to intervene and become a party to the proceeding.

Authority of the arbitrator is defined and limited by Article 7 and Article 8 of this Agreement. In the event the arbitrator finds that he has no authority or power to rule in the case, the matter shall be referred back (sic) to the parties without decision or recommendation on the merits of the case. The arbitrator shall be requested by the parties to issue his decision within thirty (30) calendar days after the conclusion of the hearing.

....

ARTICLE 18a
EMPLOYEES' BILL OF RIGHTS

All employees within the Bargaining Unit shall be entitled to the protection of what shall hereafter be termed as the "Police Officers' Bill of Rights" which shall be added to the present Rules and Regulations of the Omaha Police Department. The Rights and procedures contained herein shall not apply to any criminal investigations.

-
- I. Unless agreed to by the employee, the CITY shall not divulge the reason for any disciplinary action that is not appealed beyond the Human Resources Director. The CITY shall make every reasonable effort to insure that no employee's home address, home telephone number or photograph of the employee which the CITY may possess, is released to the news media, or for public consumption. Should it be determined that this information was released, this, in and of itself, shall not be reason for change, in any fashion, of the disciplinary action that was imposed.
-

OTHER RELEVANT DOCUMENTS:

RULES OF CONDUCT

POLICY:

All personnel will be guided by, and adhere to, any orders or instructions lawfully given by a superior officer whether or not it is contained in the printed Rules, Regulations and Orders.

CHAPTER 1

GENERAL RULES OF CONDUCT:

Every officer or employee of the Police Department who is found guilty of any of the following offenses, or in violation of any of the Rules, Regulations or Orders of the Police Department now in force or that may hereafter be issued, may be reprimanded, suspended without pay, be reduced in rank, or be dismissed from the Department, upon the recommendation of the Chief of Police.

Official notification of disciplinary action will be given in accord with the labor agreement in effect at the time of the disciplinary action taken.

Such disciplinary action will be subject to appeal to the Personnel Board in the event the officer or employee will appeal, in writing, to the Personnel Board within ten (10) working days of the official notification of such action.

CHAPTER 1 - SECTION 1

CONDUCT UNBECOMING AN OFFICER OR EMPLOYEE:

In general, this section regulates the conduct of officers and employees of the Police Department while on or off-duty, whether in uniform or plain clothes.

Any act or omission that is not in accord with the general and accepted code of moral or ethical conduct is covered by this regulation.

Police officers and employees should always bear in mind their actions and conduct, are subject to close and constant scrutiny by the public. Any type of behavior that is open to criticism results in disrepute and criticism to the entire Police Department, not just to the individual officer or employee involved.

Any and all actions, or conduct, which are detrimental to the reputation of the officer or employee of the Police Department are violations of this section.

In interpretation of this Rule, we find that areas of regulatory types of crime in the Law Enforcement System create possible questions as to interpretation of "Conduct Unbecoming an Officer" concerning actions of officers and/or employees of the Omaha Police Department. Clarification in four areas of vice type regulatory crimes are as follows:

I. GAMBLING:

...

II. PROSTITUTION:

...

III. ILLEGAL LIQUOR:

...

IV. ILLEGAL DRUGS:

...

SUMMARY

These policy rules are designed as conduct rules for a police officer or police employee for personnel disciplinary purposes. Any of these violations which are, by themselves, statute or ordinance violations, would be recommended for prosecution in the Courts in addition to any personnel action from the Police Department.

...

The attitude of the general public toward police officers and Police Department employees is that the moral and ethical behavior of Police Department employees should be higher than the regular moral and ethical behavior of the public at large. Police employees must hold themselves above suspicion in any of these areas as they have a far great degree of responsibility toward their surroundings or their activities than members of the general public.

This policy statement is not intended to be all-inclusive nor all-exclusive, but is intended as example guidelines.

...

CHAPTER 1 - SECTION 9

FAILURE TO MAKE A REQUIRED REPORT OR MAKING IMPROPER OR INCOMPLETE REPORTS:

Any officer or employee of the Police Department who deliberately fails to make a required report, or makes an incomplete or improper report will be guilty of a violation of this section.

This section will apply to any and all official reports of the Police Department and to any and all other written or oral reports requested by Command Officers, or their duly authorized representatives.

A written report will be submitted in every instance information is submitted to the Police Department, unless otherwise directed by a Command Officer, and such reports will include all information requested and will be as factual as is possible. All reports will be submitted in a timely manner.

....

FORCE RESISTANCE AND CONTROL CONTINUUM

POLICY:

When force is necessary, officers will use discretion to determine which less-lethal or deadly force technique or weapon is authorized to best de-escalate the incident and bring it under control in the safest manner possible.

PROCEDURE:

I. RESISTANCE CONTROL CONTINUUM

Levels of Resistance

Psychological Intimidation
Verbal Non-Compliance
Passive Resistance
Defensive Resistance
Active Aggression
Deadly Force Assaults

Levels of Control

Officer Presence
Verbal Direction
Soft Empty Hand Control
Hard Empty Hand Control
Intermediate Weapons
Deadly Force

II. RESISTANCE CONTROL CONTINUUM

A. Types of Resistance (Subject).

1. **Psychological Intimidation:** Non-verbal cues indicating subject's attitude, appearance & physical readiness (i.e., blank stare, clenching fist(s), tightening jaw muscles, etc.).
2. **Verbal Non-Compliance:** Any verbal response indicating subject's unwillingness to obey commands of detainment or arrest or to stop unlawful or dangerous behavior.
3. **Passive Resistance:** Any type of resistance where subject does not attempt to defeat the officer's attempt to touch or control but will not voluntarily comply with verbal and physical attempts to control (i.e., dead weight).
4. **Defensive Resistance:** Any action by a subject that attempt to prevent an officer from gaining control of the subject (i.e., pulling or pushing away, resistance to handcuffing, holding onto steering wheel, etc.).

5. Active Aggression: Includes physical actions/assaults against the officer or another person with less than deadly force (i.e., advancing, challenging, punching, kicking, grabbing, wrestling, etc.).

6. Deadly Force Assaults: Any force used against an officer and/or another person that may result in great bodily harm or the loss of human life.

B. Methods of Control (Officer)

1. Officer Presence: Identification of police officer's authority by uniformed presence or verbal identification or being a police officer.

2. Verbal Direction: Commands of direction of arrest. Most subjects comply with verbal direction and the officer's presence.

3. Soft Empty Hand Control: Techniques designed to control Passive or Defensive Resistance. Used when verbal commands are not effective, and subject does not comply with lawful orders. Techniques include strength techniques, joint locks, pressure points, and knee strike distraction techniques. Soft Empty Hand Control techniques may inflict pain to gain control. Generally, they will not cause any form of bruising or injury to the subject. These techniques also include use of handcuffs, pressure point, joint locks, single leg sweeps and takedowns.

4. Hard Empty Hand Control: Techniques designed to control Passive or Defensive Resistance or Active Aggression. These techniques can be used to control Defensive Resistance when lower forms of control have failed or when the officer believes that lower forms of control will fail. Hard Empty Hand Control techniques have a probability of injury in the form of bruises, contusions or lacerations. The techniques include: angle kick, knee strikes, palm heel strikes, straight punch, brachial stuns, double leg sweep, LVNR, and shoulder pins.

5. Intermediate Weapon: Application of any weapon or object that is not part of the human body to control resistance or an assault. These weapons include batons, chemical agent, taser, pepperball, or emergency improvised impact weapons.

7. (Sic) Deadly Force: Any force used by an officer that may result in great bodily harm or the loss of human life.

C. Variables

1. Officers may enter the continuum at any level and are not required to escalate step by step. Officers should follow the on-plus-one theory by keeping the level of control one level above the level of resistance if applicable.

2. Totality of the circumstances should be taken into consideration when using the Resistance Control Continuum:

- a. Size (officer to the subject and subject to officer);
- b. Number of subjects per officer and number of officers per subject;
- c. Gender (man to man, woman to man, woman to woman);
- d. Environmental conditions (night, dark, rain, sleet, snow, dawn, wind);
- e. Danger to officer (known violence of offender, location of incident, repetitious callbacks).

...

USE OF FORCE: IMPACT WEAPONS

POLICY:

It is the policy of the Omaha Police Department that officers will use only that force reasonably necessary to effectively bring an incident under control.

PROCEDURE:

Officers may carry authorized baton upon receiving training in appropriate techniques. "Resistance Control Continuum" recognizes use of the baton as an intermediate weapon.

I. APPLICATION OF IMPACT WEAPONS

- A. The purpose for delivery of an Impact weapon strike is to create temporary motor dysfunction and mental stun as a means to temporarily disable an offender, and never with intent to inflict permanent injury.
- B. Officers are cautioned to avoid targets with high injury potential, such as bones and joints.
- C. Primary targets for use of the baton are major muscle groups and motor points in the leg.

II. USE OF IMPACT WEAPONS

- A. The baton is the primary police impact weapon and should be used by officers to protect themselves or others from potential or actual bodily harm.
- B. Officers are authorized to use an impact weapon to subdue a Defensive Resistance subject who refuses to comply with verbal commands and who has displayed, through words or actions, behavior indicating the subject will resist arrest or assault the officer. The officer must be able to articulate that use of lesser means of force was not appropriate or would prove to be ineffective.

December 2009

NOTE: The baton should NOT be used to target the spine, groin, and kidneys unless deadly force is authorized.

IV. REPORTING REQUIREMENTS

- A. Officers are required to complete a Chief's Report (OPD Form 214) whenever an impact weapon is used to subdue an offender. This report will include the following information:
 - 1. Brief outline of details of the incident describing officer's observations and actions; subject's actions, comments and demeanor; and techniques used to subject.

FINDINGS OF FACT:

1. During the late evening hours of May 28, 2011 and the early morning hours of May 29, 2011, three "officer in need" calls were transmitted throughout the City of Omaha causing officers in the City to be thinly spread out.

2. An "officer in need" call may occur when a law enforcement officer's life is in danger or when a law enforcement officer needs assistance in making an arrest and the suspect will not be apprehended unless immediately arrested; may cause injury to him or herself or others or damage to property unless immediately arrested, or may destroy or conceal evidence of the commission of a crime. When an "officer in need" call is made, local, state and federal law enforcement officers may respond.
3. One of the "officer in need" calls was for assistance in calming a crowd that had gathered outside Club Seville, a club located in North Omaha, as the Club was closing for the night. As the crowd was milling around in the parking lot of the Club, an exchange of gun fire occurred and at least one civilian was shot.
4. The civilian, later determined to be a high-ranking 29th Street Blood gang member with a reputation for extreme violence, was transported to the Creighton University Medical Center emergency room for medical treatment.
5. Another of the calls was for assistance in keeping the crowd of 30 to 50 people representing 29th Street Blood gang members, family, friends and others drawn to the hospital due to the shooting which had gathered in the emergency room waiting room of the Creighton University Medical Center calm after it learned the gang member had died.
 - Many of those in the crowd believed the police had shot the gang member at the Club Seville and were agitated; behaving angrily; making statements such as "fuck the police" and "cop-killers", and making threats of "kill the police".
6. Among those in the crowd was the individual ultimately arrested that evening, a large individual standing 6' 4" tall and weighing 320 pounds who identified himself as a family member.
 - Multiple officers testified that most of the time this individual was in the lobby area he was pacing back and forth; talking on his cell phone, and eyeing the officers and their service weapons.
 - The officers also testified the individual became further annoyed when his girl friend was not allowed into the waiting room after access to the area had been limited and

became even more agitate when a City Councilman and community activist was allowed into the room to act as a liaison between the crowd and the police.

- During the approximately 30 to 40 minutes that this individual was in the emergency room waiting room area, officers testified he was told several times that he would need to calm down and lower his voice and that if he did not stop using vulgar language and making threats he would be asked to leave,
 - Since this individual refused to calm down and was inciting the crowd, the plainclothes detective testified that he was told he must leave or he would be arrested.
 - He initially complied and began to leave the area. As he left the waiting room several police officers followed behind him.
 - As he exited the waiting room area he told one of the officers not to touch him or he would hit him.
7. Once outside the emergency room waiting room, this individual began to walk toward the ramp but turned around and come back yelling profanities.
8. At that point the plainclothes detective on the scene directed that he be arrested. In response, one of the officers attempted to take this individual into custody by grabbing his wrist whereupon the individual pulled his arm away; shouted "Get your fucking hand off me" and punched the officer with a closed right fist on the left side of the officer's head. Several officers, including the Grievant, immediately came to this officer's assistance and following is the series of events that took place:
- The first officer to come to the initial officer's assistance came toward the individual and struck him three times in the peroneal area with his baton in an effort to temporarily disable the individual. These strikes did not have the desired effect so several other officers, including the Grievant, tackled the individual in an effort to take him to the ground. In the process, the individual grabbed the Grievant around the waist and the Grievant testified he believed the individual was reaching for his gun.

- As this individual continued to fight off the officers, one of the officers, a female officer, deployed a taser striking him in the chest area. Since the taser did not seem to affect him and he continued to fight with the officers who were attempting to gain control over him, it is unclear whether a taser connection was made.
- Another officer, also a female officer, seeing that the initially deployed taser had not affected the individual also deployed a taser from approximately three feet away.
- The individual then fell to the ground but continued to struggle with the officers.
- After getting this individual to the ground, the officer who had been struck in the head gave this individual repetitive verbal commands to put his hands behind his back. When the individual did not comply but continued to fight with the officers, this officer gave him two to three hand strikes to his back area and one knee strike to his left side, none of which caused the individual to comply.
- At this same time, another officer to the right of the individual delivered two to three leg strikes to the individual none of which seemed to affect the individual.
- The individual continued to ignore the verbal commands to cease fighting and put his hands behind his back but finally placed his right hand behind his back once the officer who had deployed the second taser drive stunned him in the middle of his back.
- During this part of the struggle the Grievant administered several palm heel strikes to the individual's brachial plexus area without success and the female officer who tased the individual delivered three kicks which she testified were intended for the individual's peroneal area.

According to the Grievant, he realized that someone had deployed a taser since he could hear the noise of deployment and was getting shocked each time he delivered a palm heel strike to the individual's brachial plexus area so he stood up. When he stood he noticed one of the taser wires caught on the left side of his gun belt so put his hand on one of the other officer's back and began directing several leg strikes toward the individual's brachial plexus area.

While the Grievant was engaged with this individual, the individual's girl friend came toward the Grievant and the struggle and the Grievant disengaged from the struggle and pushed the female away.

Another officer or security guard took control of the woman and the Grievant returned to the struggle with the individual which he thought was about over since the individual was completely prone on his stomach.

- Upon returning to the struggle, the Grievant delivered two more strikes in a sideways motion toward the individual which he failed to detail in his Chief's Report.
 - The individual's left hand was still stretched out, however, and, according to the Grievant, he kicked at or stomped on the individual's hand in an effort to get the individual to put his hand behind his back.
 - The Grievant then placed his right knee on the individual's back which, according to the Grievant, was to prevent the individual from rolling over while the cuffing officer was handcuffing the individual.
9. While the skirmish with this individual was taking place, approximately 20 to 30 of the people in the crowd in the waiting room were trying to rush the doors to assist the individual. Their efforts were thwarted initially by two State Troopers who held the emergency room doors closed and eventually by the hospital who had remotely locked the doors.
 10. Once the individual was handcuffed, he was transported to the Douglas County Corrections for booking. His girl friend was also arrested on a charge of obstruction.
 11. Later that same day, Chief's Reports were filed by the officers involved in the skirmish, including the Grievant.
 12. Before a Chief's Report may be submitted to the Chief of Police three of the officer's superiors must sign off. In the Grievant's case, one of his superiors testified that he and the Grievant went through several revisions and nearly an 8-hour shift working on the narrative to ensure its accuracy. Nonetheless, two of the kicks delivered by the Grievant were not reported.

13. As the result of assisting one of the officers file a Chief's Report, the sergeant (a shift supervisor) who assisted the officer called the Center to see if they had a video which could be reviewed before the Chief's Report was filed.
14. After reviewing the video a second time, this sergeant expressed some concerns he had with the force used by two officers, one of which was the Grievant, and after expressing his concerns was directed to forward his concerns along with the video to one of the captains who then directed him to complete an internal information report and turn it in to the Chief of Police via the chain of command.
15. On June 11, 2011, the head of Internal Affairs directed a request to the Chief of Police which sought an investigation of the use of force in the May 29 incident and the investigation was approved.
16. Three officers were targeted for an investigation, the Grievant and two female officers and the case was assigned on a rotating basis to one of the sergeants in Internal Affairs.
17. As part of his investigation, the sergeant assigned the case gathered all Chief's Reports and incident reports and summary reports concerning the incident and began interviewing those individuals involved in the incident.
18. Among those he interviewed were the individual who had been arrested in the incident; his girl friend and a female police officer who seemed to be an observer when the skirmish occurred.
19. This female observer, in an interview where the questions were often leading and her questions were expanded upon by the interviewer, stated that she thought the Grievant had kicked the individual who had been arrested at least twice in the head.
20. Each interview was summarized in the working draft of an Internal Affairs Executive Case Summary prepared by the sergeant and reviewed by sergeant's supervisor who prepared his own summary and provided a final version to the Chief of Police.
21. While the Chief of Police was reviewing the summary in late August an edited version of the video was released to a local television station, the viewing of which raised significant community concern as to whether the police department's officers had used excessive force on May 29 when they arrested the individual.

22. The video was released without permission of the officers being investigated in violation of their collective bargaining agreement but no action was taken since it remains unknown as to who released the video.

23. On September 1, 2011, following the video's release and after reviewing the file, the Chief of Police ordered Internal Affairs to interview the Omaha Police Academy's defensive tactics training instructor and members of the crowd that were inside the hospital that could be located.

24. The Chief of Police also requested an extension of the time period in which to complete the investigation but the Union exercised its right to deny the extension as provided for in the collective bargaining agreement.

25. The defensive tactics training instructor was interviewed on September 2, 2011 and concluded that the video was not very conclusive; that most of the Grievant's actions were within department policy but not what is taught, and that if the Grievant had kicked the arrestee in the head as he had been told by the interviewer, his conduct was inappropriate.

26. A verbal summation of his interview of was given to the Chief of Police on September 2, 2011 and a letter recommending the Grievant's termination effective that date was prepared and given to the Grievant.

DISCUSSION:

The charges against the Grievant include excessive use of force; conduct unbecoming an officer and failure to provide a complete report. More specifically, based upon a finding by the Chief of Police that the Grievant did not document two kicks in the Chief's Report; a finding that the Grievant's physical actions during the struggle to handcuff the arrestee were not within policy in that front kicks to the brachial plexus region are not taught in the academy and go beyond a standard of reasonableness and that the Grievant kicked the arrestee in the head when the arrestee was displaying minimal defensive resistance and had three officers on top of him; a finding that dropping a knee on the arrestee's back was not a reasonable response relative to the arrestee's behavior; a finding that the Grievant's use of force was excessive and beyond that permitted by the Standard Operating Procedures (S.O.P.), and a finding that the

Grievant's Chief's Report did not accurately reflect his actions during the incident, the Grievant was charged with violating the following:

S.O.P., Volume I, Admin., Personnel Rules of Conduct, Chapter 1, Section 1, Conduct Unbecoming an Officer or Employee;

S.O.P., Volume I, Admin., Personnel, Rules of Conduct, Chapter 1, Section 9, Failure to Make a Required Report or Making Improper or Incomplete Reports;

S.O.P., Volume II, OPS F, Force - Resistance and Control Continuum;

ARTICLE 6, SECTION 1 of the collective bargaining agreement, DISCIPLINARY ACTION - CAUSE, and

ARTICLE 6, SECTION 1, j. of the collective bargaining agreement, Commission of acts or omissions unbecoming an incumbent of the particular officer or position held, which render his admonishment, reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient conduct of business of the CITY or for the best interest of the City government.

Under Article 2, Section 5 of the collective bargaining agreement, the City retains the authority to discharge or take other disciplinary action against employees for just cause and under Article 6 of the collective bargaining agreement, the parties have agreed that just cause for discipline or discharge includes actions which reflect discredit upon the service or which hinder the "effective performance of the City's government functions."

Acknowledging it has the burden to prove just cause, the City, citing two arbitration cases and *Public Employee Discharge and Discipline*, asserts that it is required to show by a preponderance of the evidence that the Grievant did that which was alleged and argues that if discipline is imposed for just cause the penalty may not be set aside unless discrimination, unfairness, or capricious and arbitrary action is proven. Further, it maintains that it expects the Union's affirmative defenses also to be proven by a preponderance of the evidence.¹

While this Arbitrator agrees that the City has the initial burden to show that the Grievant did that which is alleged and that once it has met its burden of proof, the burden shifts to the Union to establish an affirmative defense, and that she may not substitute her judgment for that of the City unless there is a finding that the City was discriminatory, unfair or capricious or arbitrary when it decided upon the degree of discipline to impose, a finding of

¹ *Southwestern Bell Telephone Co. v. Communications Workers of America*, 66-3 ARB §5866; *In re Certaineed Corporation*, 78 LA 1291 quoting *Speciality Paper Box Co.*, 51 LA 125, and *Public Employee Discharge and Discipline*, Isadore Silver, Volume 1, Sec. 3.01.

just cause also requires that the evidence submitted as proof shows not only that the grievant did that which was alleged but whether there was just cause for the penalty imposed on the grievant. Further, while the degree of proof and the standards which must be met when establishing just cause may vary depending upon the arbitrator, this Arbitrator, as do most arbitrators, requires the employer when establishing just cause for discipline to show that the employee was not only given notice of the charges against the employee but was given a meaningful opportunity to be heard and given a fair and factual hearing which includes the right to confront and cross-examine the employee's accusers. In addition, in establishing just cause for the penalty, the employer is required to show that it imposed discipline without undue delay; that consideration was given to the specific mitigating and aggravating factors surrounding the incident when deciding upon the degree of discipline to impose, and that the Grievant was treated no differently than other employees in similar situations. Also inherent in a finding of just cause is proof that the employer either applied progressive discipline or, in the alternative, that the misconduct was so egregious that more serious discipline was immediately warranted.²

In this dispute, it is concluded that the City did not have just cause to terminate the Grievant either for his conduct during the incident or for his failure to provide a complete report. Further, it is concluded that while the evidence supports a finding that the Grievant failed to provide a complete report, the degree of discipline imposed was not consistent with the degree of discipline received by other employees who committed similar offenses. These conclusions are based upon a finding that the evidence submitted by the City as proof that the Grievant used excessive force was not persuasive; that the evidence submitted by the City as

² Discipline and Discharge in Arbitration, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, Chapter 2; Management Rights, BNA Books Arbitration Series, The Bureau of National Affairs, Inc., Washington, DC, 1986, pp. 95-104; How Arbitration Works, Sixth Edition, Elkouri and Elkouri, The Bureau of National Affairs, Washington, DC, 2003, pp. 931-933; *Arbitral Discretion: The Tests of Just Cause*, John E. Dunsford, Arbitration 1989 The Arbitrator's Discretion During and After the Hearing, Proceedings of the Fourth Second Annual Meeting, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC 1990, Chapter 3, pp. 23-64; Labor and Employment Arbitration, Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14; Chapter 15, p. 15-7; 613 F.2d 716, 103 LRRM 2380 (8th Cir.), cert. denied, 446 U.S. 988 (1980); The Common Law of the Workplace, The Views of Arbitrators, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, Chapter 6, and Just Cause, The Seven Tests, Second Edition, The Bureau of National Affairs, Washington, DC, 1992.

proof that the Grievant intentionally provided an inaccurate Chief's Report also was not persuasive, and that the City acted arbitrarily when it decided termination was the appropriate degree of discipline to impose. Following is the discussion concerning the findings and conclusions.

Pre-Incident Circumstances:

Both parties spent a substantial amount of time discussing the events that led to the incident which resulted in the Grievant's termination for excessive use of force. The record clearly establishes that prior to the incident resulting in the excessive use of force charge, there was cause for those officers on the scene at the Creighton University Medical Center (Center) to be concerned about what might transpire. It is undisputed that prior to the incident at the Center a shooting had occurred at the Club Seville in North Omaha and that the crowd there believed the civilian who had been shot had been shot by law enforcement. It is also undisputed that the civilian who had been shot there and transported to the Center was a notorious gang member; that he was declared dead while at the Center; that the crowd which had amassed at the Center's emergency room waiting area (estimated to be anywhere from thirty to fifty people) consisted of family, friends, gang members, and others interested in the gang member's shooting, and that most of them were agitated, believing the gang member had been shot by law enforcement. Further, it is undisputed that there was no metal detector at the Center so officers had no way of knowing whether anyone in the crowd had a weapon and, finally, it is undisputed that many of the gang members left the waiting room when the crowd was told that anyone who wished to remain in the waiting room would need to provide their names to the officers there.

In addition, while the City argues that the officers who were on site during the incident made the situation seem more dangerous when they testified at the hearing than when they completed their reports there is no question that the crowd and the circumstances under which they had gathered was cause for law enforcement to be tense about the situation and concerned about controlling the crowd. Further, the City does not dispute that the individual who was ultimately arrested was agitated when he arrived at the emergency room waiting area, was pacing back and forth in the waiting area, was using profanities, and had been told

that if he did not calm down he would need to leave. It also admits that this individual, a large man who was six feet, three to four inches tall and who weighed nearly three hundred pounds, give or take twenty pounds, was ultimately told to leave the waiting room and that although he left he was slow in departing from the room.

The record further establishes that when this large individual arrived at the emergency room waiting area, he identified himself as a member of the family and, while agitated when he arrived, became even more upset when his girl friend was denied access to the waiting room and when a City councilman was allowed into the waiting room area to act as a liaison between the crowd and the officers. It also establishes that when this individual left the waiting area after being told he would have to leave, he told at least one officer as he exited not to touch him or he would hit him. In addition, the record establishes that when this individual left the waiting room he proceeded toward the parking ramp only to turn around and walk back toward the emergency room entrance spouting profanities; that at that time the plainclothes detective on the scene directed that he be arrested, and that when one of the officers reached out to arrest him he pulled his arm away; closed his hand into a fist and swung at the officer hitting him on the side of his head whereupon several officers, including the Grievant, came to the officer's assistance. And, finally, it is undisputed that one of the officers who came to the first officer's assistance struck the individual with his baton three times in the peroneal area in an effort to control the individual and that none of these strikes affected the individual.

Incident:

While the parties agree, for the most part, on what happened prior to the incident that resulted in the excessive use of force charge and the fact that these earlier incidents contributed to the tense situation which existed at the Center that night, they do not agree on what transpired once the officers attempted the arrest even though the incident was recorded by a parking lot surveillance camera. The video from this camera shows that once the officers came to the assistance of the officer who had attempted to arrest the individual a skirmish ensued. From the video it is evident that five officers, including the Grievant, were involved in attempting to handcuff the arrestee; that at least two other officers and the plainclothes

detective were standing near the skirmish and observing it during the period of time between when the arrestee and the officers were on the ground attempting to handcuff the arrestee and his ultimately being handcuffed, and that other law enforcement officers and/or at least one security guard were near the skirmish at various points in time. Further, the video shows that the arrestee's girl friend was also near the skirmish and was held back by an officer or security guard at least once; that the arrestee continuously resisted being handcuffed during the minute-plus it took to handcuff him, and that the arrestee continued to move about for at least another minute-plus after being handcuffed and prior to his being helped from the ground and transported to a police car.

The video also shows that at least two officers had their tasers out and pointed at the arrestee, and that two officers, one male and one female, were sitting on the arrestee's back once he was on the ground. It also shows that the Grievant appears to be applying palm heel or fist strikes to the arrestee's brachial plexus area several times immediately after the arrestee was taken to the ground and that the Grievant, while standing in a crouched position with his hand on another officer's back moves his right leg in a motion that appears to be at least three or four kicks to the arrestee during the encounter; that he also moves his leg in a sideways motion in what appears to be a kick or shuttle kick at least twice; that he stomps his right foot twice and that he puts his knee on the arrestee's back.³ And, finally, the video shows that other officers also delivered hand and leg strikes to the arrestee's body and that one of the female officers attempted three kicks at the arrestee's side or thigh area during the period when the Grievant appears to be delivering palm heel or fist strikes and puts her foot on the arrestee after he has been handcuffed; that the other female officer remains on the arrestee's back throughout the skirmish and even after the arrestee has been handcuffed; that many of the officers involved in the struggle or observing the skirmish look toward the emergency room entrance several times throughout the incident; that once the arrestee was handcuffed and brought under control, all of the officers involved in the struggle except the two female

³ The camera changes position during the time when the Grievant is seen moving his right leg in what appears to be kicks to the arrestee and it is unclear whether it has recorded three or four kicks but it appears to be four kicks.

officers, left the scene; that other officers milled about the area after the arrestee was handcuffed, and that one of the two female officers who had remained with the arrestee directs a female officer who had been present during the struggle but had not participated in the struggle toward the direction of the girl friend. While an explanation of what transpired has been given, mostly through incident reports and Police Chief Reports, there is no audio with the video and the video, itself, does not show where the Grievant's palm heel strikes, kicks or stomps landed nor where the female officer's kicks landed. Thus, the video tape is not sufficient evidence to sustain a finding that the Grievant used excessive force during the skirmish with the arrestee or that he kicked him twice in the head.

The only other evidence submitted as proof that the Grievant did that which was alleged is an interview the female officer who had been present during the skirmish that evening but had not participated in the struggle and the statements of the arrestee and his girl friend taken by Internal Affairs and there are significant problems with these statements.⁴ First, the statements of the arrestee and girl friend are not found to be persuasive since there assertions are not supported by the video and differ substantially from any report by any officer present at the scene. Secondly, the female officer's interview is suspect since one must question what she was able to see during the skirmish; since her version of events also differs substantially from the reports of other officers involved in the incident, and since it is evident that the investigative interview was tarnished.

The video shows that this female officer was one of the officers who stood nearby and seemingly observed most, if not all, of the skirmish. Without her testimony at hearing as to what she saw, however, her statement about what she observed must be questioned. The City's assertion that she had a clear view of arrestee's head is simply an assertion that is based

⁴ While both parties provided expert witness testimony regarding the types of force an officer is allowed to use on the use of force continuum and their analysis of whether the Grievant used excessive force based upon their review of the video, their testimony was helpful only in understanding when certain types of actions might be considered excessive force. Neither witness's testimony was persuasive in determining whether the Grievant had used excessive force since both expert witnesses agree that what is seen on the video is inconclusive and speculate as to the degree of resistance exhibited by the arrestee and as to where the strikes landed. Further, it is especially significant that opinions expressed by the City's expert witness are largely based upon the Internal Affairs interviewer's statement asserting that the Grievant kicked the arrestee in the head and not on that expert witness's conclusion from viewing the video.

upon an assumption and cannot be verified without testimony from this observer to that assertion. Further, the fact that the video shows she was located to the right of another officer also observing the incident and was standing, for the most part, at the feet of the arrestee with her view of the arrestee's head blocked by the bodies of two other officers sitting on his back raises doubt as to whether she actually saw the Grievant kick the arrestee in the head since the other officer who was closer to the Grievant states he did not see the Grievant kick the arrestee in the head. Finally, her statement is even more suspect not only because she is the only observer to state that she saw the Grievant kick the arrestee in the head but because she denies seeing other officers kick the arrestee even though the video shows other officers kicking the arrestee; since they made statements to that effect and since they testified to that effect.

In addition to the fact that the video indicates this officer had a limited view of what happened that night, the only incident report she submitted referred to her arrest of the "girl friend" and a review of the Internal Affairs interview indicates not only that she was asked leading questions by the interviewer but that her responses were couched in terms of uncertainty which were often firmed up by the interviewer, and that most of her responses are inconsistent with the reports and statements given by all other officers involved in the incident.⁵ Further, since this officer did not testify at the hearing, the veracity of her statements is at issue not only because the Grievant was denied the opportunity to question

⁵ Following are concerns with statements made by this officer during the interview: When she was asked about the number of people in the crowd she said the room was full but her estimate was lower than that of any other officer involved that evening. When asked about the arrestee's behavior in the waiting room, she replied that she didn't remember him "saying anything". When asked about the incident involving the City councilman, her recollection again differed substantially from the statements made by any other officer present when the councilman was present. When asked where the Grievant's palm heel or fist strikes (described as punches by the interrogator) landed she replied that she did not see where they landed but she "assumed in the head somewhere". A review of the video tape shows that she was not even present at that time. When asked about "little kicks" by the Grievant, she again stated she "didn't see exactly where they landed" but that she thought "most of 'em were hittin' like maybe the side of his (the arrestee's) head or the top of his shoulder," and that she thought one of the kicks "actually hit . . . (an officer's) hand." When asked about kicks that came after that, she said she had seen them and that she thought "those hit him in the head" and after questioned about whether it was the side of the head replied it was but then stated she could not remember whether it was on the left or right side of his head. Then, after more questioning about the kicks landing on the side of the head or on his face said ". . . I can't recall for sure," "I, I wanna say it was - it was probably more up here. You know what I mean?", and then when asked was it in the cheek area, replied "yeah" but that she "can't recall for certain". During this interview most of the questions asked were leading and most of the answers given were in response to the leading questions and were couched in terms of uncertainty.

them to determine their veracity but because there was no way to determine why her views differed so substantially from the views of the other officers present at the incident.⁶ Without a way to determine why her statement differs so substantially from that of all the other officers, including the Grievant, it can only be concluded that her statement lacks merit.

Excessive Use of Force:

The termination letter sent to the Grievant and the statements made by the Police Chief at the hearing indicate that the Grievant was terminated primarily because it was concluded that the Grievant had kicked the arrestee in the head two times during his arrest and that such kicks were the equivalent of deadly force without cause for deadly force. While the Chief believes, based upon his review of the video and the statements of the female officer, the arrestee, and his girl friend, that the Grievant kicked the arrestee in the head two times, the evidence in the record does not support his belief. Further, if the Chief believed that the Grievant's actions during the incident were unnecessary and constituted the use of excessive force, one must seriously question why he did not immediately suspend the Grievant pending results from an investigation since he testified that he had reviewed the video shortly after the incident occurred when he was asked to authorize an investigation of the incident and since he considered the Grievant's conduct serious enough to warrant termination.

Although the Chief cites the video as one of the primary reasons for his decision to terminate the Grievant, he testified during hearing that the video, in his opinion, did not clearly show what happened during the incident but that his reason for terminating the Grievant was based upon the fact that the arrestee, his girl friend and an officer all stated that the arrestee had been kicked in the head (presumably but left unsaid by the Grievant) and that that information had not been included in the Grievant's Chief's Report. The Police Chief also testified that he had relied upon the defensive tactics training instructor's conclusions about whether the Grievant had used excessive force and a belief that the arrestee was showing

⁶ See *Wagner & Swasey Co.*, 65 LA 709 (Walter, 1974); *Apollo Merchandisers Corporation*, 70 LA 614 (Roumell, 1978) in which it is concluded that for the truth of a report to be established it is necessary for the reporter to testify and be subject to cross-examination since failure to testify denies the opportunity to challenge the veracity of the report and be subject to cross-examination since failure to testify denies the opportunity to challenge the veracity of the report.

minimal resistance at the time the kicks occurred. Setting aside the most important fact, that nothing in the record establishes where any kick landed, the Chief's reliance upon the defensive tactics training instructor's opinions is misplaced since, as stated before, a review of this expert's interview indicates that his opinions were based upon the Internal Affairs interviewer's representation that the Grievant had kicked the arrestee in the head and not an individual finding based upon his review of the video.

Further, although the Chief also decided that the arrestee was minimally resistant at the time he believed the kicks occurred, nothing in the record supports his conclusion. The Grievant's expert witness testified that he didn't believe any officer, including the Grievant, used excessive force which indicates that he believes each officer's use of force was consistent with the arrestee's level of resistance shown at the time. The City's expert witness testified, relevant to the kicks, that while he could see no reason to kick somebody in the head at that time "the video is pretty inconclusive as far as . . . where he actually made contact". The Chief Reports which were filed and which require officers to identify the levels of force used by the officer making the report and the levels of resistance experienced indicates that all officers filing these reports indicated the arrestee demonstrated verbal non-compliance and active aggression.⁷ And, finally, at hearing at least five of the officers present at the Center that night testified the arrestee's level of resistance varied mostly from defensive resistance to active aggression. This is a strong indication that while the level of resistance demonstrated by a suspect may vary from moment to moment the arrestee in this instance was showing high levels of resistance for nearly the entire two minute plus period of time it took to arrest and handcuff him and the officers' reactions were reasonable.

⁷ In addition to listing these three levels of resistance, three of the officers also reported psychological intimidation and defensive resistance and one officer reported passive resistance. This suggests that most of the officers involved in the incident considered the arrestee's conduct to much more than minimal resistance and contradicts the level of resistance the Chief surmised from his viewing of the video. In the incident considered the arrestee's conduct to much more than minimal resistance and contradicts the level of resistance the Chief surmised from his viewing of the video.

Failure to File a Complete Report and Appropriateness of Discipline:

Given the finding that the City has failed to prove that the Grievant used excessive force during the incident in question, the issue of whether he was guilty of conduct unbecoming an officer also falls by the wayside since the parties agree that this charge is dependent upon a finding that the Grievant used excessive force. Based upon this fact, the remaining issue is whether the City has just cause to terminate the Grievant for failing to file a complete Chief's Report. In this respect, it is undisputed that while the Grievant adequately documented most of his actions that night, including palm heel (or fist) strikes and several leg strikes, he failed to include two leg strikes in his report, the two which the Police Chief had decided were kicks to the arrestee's head. While the Grievant's failure to include these strikes is a minimal offense given the fact that the video was also submitted with his report, the reason for failing to include these strikes which he gave lacks credibility and, therefore, some discipline is appropriate. Based upon the evidence pertaining to the degree of discipline imposed upon other officers who failed to file a complete report it is concluded that a more reasonable degree of discipline would be a two working-day suspension.⁸

DETERMINATION

The City does not have just cause to terminate the Grievant for use of excessive force during the incident which occurred May 29, 2011. Further, without a finding that the Grievant used excessive force during the incident on May 29, 2011, there is no finding that the Grievant was guilty of conduct unbecoming an officer and, consequently, the City does not have just cause to terminate the Grievant for conduct unbecoming an officer. Finally, while the Grievant failed to include two kicks in his Chief's Report, the failure was minimal in impact since the video of the incident was also included. Consequently, the City does not have just cause to terminate the Grievant for failure to complete a Chief's Report. Since the Grievant did fail to include this action in his Chief's Report, the City does have just cause to discipline the Grievant. Based upon evidence of discipline imposed for similar misconduct, it is concluded that the

⁸ See Union Exhibit 34 which includes a twenty working-day suspension without pay for making false, improper or incomplete reports as well as other misconduct; a reprimand for failing to file a timely Chief's Report, and a reprimand for failing to document knee strikes in a Chief's Report.

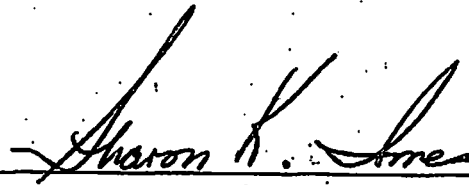
Grievant should receive a suspension of two working-days. Accordingly, the award is as follows:

AWARD

The grievance is sustained in part and denied in part. There is just cause to discipline the Grievant for failing to file a complete Chief's Report and the City is ordered to impose a two working-day suspension upon the Grievant for this misconduct.

Further, since the City does not have just cause to terminate the Grievant for use of excessive force or for conduct unbecoming an officer, the City is ordered to reinstate the Grievant and to make him whole, less wages for the working-day suspension for all wages and benefits lost between the date he was terminated and the date he is returned to duty.

The Arbitrator retains jurisdiction over this award solely for purposes of implementing the award.

A handwritten signature in cursive script, reading "Sharon K. Imes", is written over a horizontal line.

Sharon K. Imes, Arbitrator

December 24, 2011

SKI